previously unknown to the Commission. See Atlantic Broadcasting Company, 5 FCC 2d 717, 721 (1966).

95. The Commission's conclusion that the Bush-Stewart telephone conversation constituted a "presentation" was based on an affidavit of Stewart given to the Inspector General wherein Stewart asserted that Bush "pointed out that Rainbow was a minority broadcaster and raised the question whether the Bureau's action was consistent with the Commission's minority broadcasting policy." (FCC Rcd at 2845, para. 32). However, at the hearing, Bush had no recollection of making that remark or one similar in nature. As recited in Finding 28, supra, Bush recalled that she told Stewart that she was calling him about Rainbow's request for an extension of time, which had been denied. Bush further states that when Stewart did not seem to recall the case, she attempted to jog his memory by reminding him that Rainbow was the applicant who had defended the minority ownership policy which went all the way to the Supreme Court. Bush states that Stewart still did not remember the case and told her he would have somebody call her back. As reflected in Finding 30, Stewart was not asked any questions at his deposition, admitted into the record in lieu of his appearance at hearing, concerning the substance of his conversation with Bush. Moreover, even after Bush's testimony, and although all parties were fully aware that Stewart had not been asked any questions on this subject, Stewart was not called to rebut Bush's testimony. Thus, her testimony is uncontradicted. On the basis of this record, it can not be concluded that Bush's telephone call constituted a "presentation" in violation of the ex parte rules.

96. The only remaining question is whether RBC intentionally violated the ex parte rules in meeting with the Commission's staff. The record clearly demonstrates that no RBC principal intended to violate the ex parte rules and that Polivy, RBC's counsel, had an honest, if mistaken belief, that her contacts with Commission staff persons were permissible. On the basis of the particular facts and circumstances of this case, the issue is resolved in RBC's favor. [16]

97. The record establishes that Polivy's belief that she had not engaged in impermissible contacts was reasonably founded on her interpretation of the Commission's ex parte Rules. In such cases, sanctions are unwarranted. See Centel Corp., 8 FCC Rcd 6162, 6164 (1993). Polivy's construction of the ex parte rules, and in particular Section 1.1204, was premised on her belief that the Commission had specifically exempted adjudicative proceedings which had not been formally opposed. See Section 1.1204(a)(1). Polivy believed that the RBC applications were exempt from the ex parte restrictions since Press' pleadings did not constitute a formal opposition as defined in Section 1.1202(e). [17] In Polivy's mind, Press' February 25,

[16] The same conclusion is warranted even if the Bush-Stewart telephone conversation was considered a "presentation."

[17] Section 1.1202(e) provides among other things that the caption and text of the pleading must make it unmistakably clear that the pleading is intended to be a formal opposition. Section 1.1202(e)(1).

1991 Petition for Reconsideration did not formalize the proceeding because it merely resubmitted the prior-filed Informal Objection under a new title.

98. Significantly, the Commission recognized that Polivy's position had "potential merit." 9 FCC Rcd. at 2844 ¶30. Further the Commission found that the applicability of its rules was "clouded" by the fact that Press had requested reconsideration "for all of the reasons set forth in its [Informal] Objection, which it incorporated by reference in its petition for reconsideration. Id. at 2844 n. 22. The Commission found that although Press' petition for reconsideration met the "bright line" test for a formal opposition, "we understand why, in the absence of a clear ruling on this point, [RBC] may have concluded that the petition for reconsideration had no more effect on the character of the proceeding than did the informal objection Press asked the Commission to reconsider." Id. at 2844-45 ¶30. Based on the foregoing, the Commission concluded that RBC appeared to have been "sincere" and "reasonably believed" that the proceeding was not restricted. Id. at 2845 ¶34. The record requires a similar conclusion.

99. With regard to the Managing Director's 1991 letter, Polivy's testimony was consistent with the manner in which she viewed the RBC proceeding. She advanced her belief that, as the aforementioned Note 1 to §1.1204(a)(1) and (2) of the Rules recite, oral ex parte communications were permitted between the formal party (RBC) and the Commission because of the informality of Press' pleadings. The Managing Director's letter was transmitted to a third party who was not a formal participant before the Commission. Hence, Polivy logically reasoned that the proceeding was restricted with regard to any contact initiated by the third party to the Commission, thus implicating the ex parte rules as to that individual. The fact that the Managing Director's letter referred to a "restricted proceeding" was, to Polivy, a matter which related directly to George Daniels, as to whom she knew the proceeding was restricted, but had no applicability to RBC. Even though Polivy's construction of the law was ultimately deemed to be incorrect, there is no basis in this record to hold that Polivy had anything less than a legitimate and legally supported belief that the Managing Director's letter and her understanding were in harmony.

100. With respect to Polivy's telephone calls to Gordon prior to the June 18, 1993 decision denying RBC's sixth extension request, Polivy's and Gordon's recollections differ. Gordon asserts that Polivy attempted to discuss the merits and he advised her that the proceeding was restricted and subject to the ex parte rules. However, he could not recall what Polivy had said either specifically or generally concerning the merits which triggered his alleged concern that the ex parte rules was impacted. Moreover, he had no contemporaneous notes of their conversations and made no written reports of an ex parte contact as he was required to do by Section 1.1212 of the Rules.

101. Polivy denies discussing the merits with Gordon or any statement by Gordon raising the ex parte rules. She asserts that her calls to Gordon were permissible status inquiries which she characterized as "aggressive", rightfully concerned with the inexplicable length of time taken to act on RBC's sixth extension of time request. She asserts that her contacts never

suggested what the outcome should be, pointing out that Gordon was already aware of RBC's position from its pleadings. The Presiding Judge finds her testimony credible and will credit her account of what transpired. In addition, Gordon's inability to recall what Polivy said either specifically or generally and his failure to make a written report of an ex parte contact as required by the rules, undercuts any reliance on his claim that Polivy engaged or attempted to engage in ex parte discussions or that the import of the ex parte rules was discussed.

102. Moreover, it is clear that the senior Commission staff did not believe that RBC's contacts were restricted. Prior to the July 1, 1993 meeting, Pendarvis asked if any objections had been filed, and Polivy freely told him that Press had opposed the extension requests. Further, the ruling itself denying the sixth extension makes clear that Press filed a petition for reconsideration. Importantly, when the July 1, 1992 meeting convened in Stewart's office, Polivy provided the staff with a handout that make specific reference to Press' informal objections and to its request for reconsideration. In short, it appears that the staff had the same understanding with regard to the ex parte rules as did Polivy. It is therefore no wonder that the Commission subsequently saw fit to "amend the Commission's ex parte rules to make them "simpler" and "clearer". See Amendment of 47 CFR §1.1200 et seq. Concerning Ex Parte Presentation in Commission Proceedings, 10 FCC Rcd. 3240 (1995). It is significant that the Commission's amended ex parte rules no longer tie its ex parte requirements to the designation of a pleading but rather to the "party" status, which is attained by the filing of a written submission served on an existing party. See Amendment of 47 CFR Section 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, FCC 97-92, released March 19, 1997, paragraph 18. These mitigating factors provide further reason why the imposition of any sanction is not justified.

103. Furthermore, even assuming, arguendo, that Polivy intentionally violated the rules, a conclusion which has no basis on the strength of this record, RBC should not bear the consequences since Rey incontrovertibly testified that he was aware of no misconduct or improprieties. There is no evidence that Rey ratified Polivy's contacts, or that he had knowledge of her discussions with Commission staff persons and with Bush. Any arguable misconduct, therefore, cannot be imputed to RBC. Further, as the Commission and the Court have previously held, RBC received no benefit from the contacts. It was merely advised to file a petition for reconsideration setting forth the facts, and there is no evidence that the staff or the Commission was swayed by the contacts to reach a favorable conclusion upon reconsideration. Therefore, no wrongdoing should be imputed to RBC. See, WORZ, Inc., 36 FCC 1535 (1964).

104. Finally, in prior cases, where there was no question regarding the applicability of the ex parte rules, the FCC has refrained from disqualifying an applicant even where the violation was intentional. Thus, in Pepper Schultz, 4 FCC Rcd. 6393, 6403 (Rev. Bd. 1989), where the matter was clearly restricted, the applicant had a Senator send a letter to the Administrative Law Judge raising the merits of the matter in litigation. The Review Board found that the violation was intentional, and that the principal knew inherently that it was wrong to try to influence a judge in an ongoing proceeding, but the Review Board found that the solicitation was an isolated event. Considering the sanctions applied by the Commission in its more current ex parte cases including cases involving "willful and repeated violations of the ex parte rules",

the Review Board concluded that such violations did not justify disqualification of the applicant. Id., at 6404. Accord Centel Corp., 8 FCC Rcd. 6162, 6164 (1993), pet. for rev. dismissed sub num. American Message Centers v. FCC, No. 93-1550 (D.C. Cir. 1994). The circumstances here, even more than in Pepper Schultz and the cases cited therein, mitigate against disqualification based on the ex parte violations. Unlike other cases, there was a basic question of whether the ex parte rules even applied. Further, the applicant itself was not directly involved in the ex parte contacts, and did not solicit those contacts. In addition, the particular ex parte contacts were isolated events in a multi-year Commission proceeding. It is therefore concluded, based on the factual record and Commission precedent, that RBC remains qualified to be a Commission licensee.

Issue 2: Financial Misrepresentation Issue

105. The issue calls for a determination whether RBC made misrepresentations of fact or was lacking in candor when it recited in its January 25, 1991 fifth extension application that it continued to be financially qualified. It is concluded that RBC's representation was entirely truthful. The record conclusively established that the oral loan agreement entered into by RBC to establish its financial qualifications remained intact and was never withdrawn. Further, the record is singularly lacking in evidence that RBC intended to deceive the Commission in representing that it continued to be financial qualified.

106. To be financially qualified, an applicant must have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the station for three months without revenue. Where an applicant relies on a loan, "[a] present firm intention to make a loan, future conditions permitting, is the essence of 'our reasonable assurance' standard." Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980). The Commission does not require a legally binding agreement whereby the lender is legally obligated to make the loan under any and all circumstances. A "reasonable assurance" that the loan will be available is all that the Commission requires. Multi State Communications, Inc., 590 F.2d 1117, 1119 (D.C. Cir. 1978). Further, the absence of a written financing agreement does not diminish the legitimacy of the financial certification. See Emission de Radio Balmaseda, Inc., 8 FCC Rcd. 4335 (1993). Northampton Media Associates, 4 FCC Rcd. 5517, 5518 (1989).

107. RBC's certification that it is financially qualified rests on an oral agreement entered into in mid-1984 between Rey and Conant whereby Conant agreed to lend RBC up to $4,000,000 to construct and operate the station for one year. The record makes clear that RBC had reasonable assurance of the continued availability of that loan at the time it submitted its fifth extension application.

108. Initially, the record establishes that the oral loan agreement was never withdrawn or put on hold. Both Rey and Conant have testified to that effect and there is no evidence which puts their testimony in doubt. The sole basis for the misrepresentation issue is testimony given by Rey in a lawsuit where RBC sought a preliminary injunction to prevent Gannett from leasing space at the top of the tower to Press. As reflected in the partial transcript of Rey's testimony (see finding 48), Rey repeatedly affirmed he had an oral agreement with Conant which had not been reduced to writing. Moreover, the discussion to items being on "hold" was shown by Rey's testimony to refer to the delay in memorializing the RBC oral agreement to writing. In this connection, it was Conant's intention to reduce the agreement to writing when the money was advanced to RBC.

109. The only question raised by Rey's testimony in the court proceeding is whether or not Conant at some point conditioned his financing of the station on RBC's maintaining its exclusive space on the Gannett tower. The Commission has made clear there is no authority for requiring applicants to (daily, weekly, monthly) reconfirm a financial commitment. FEM Rey, Inc., 6 FCC Rcd. 4238, 42240, note 5 (Rev. Bd. 1991). The obligation under 47 CFR 1.65 is triggered only when the applicant actually loses his "reasonable assurance." Id. at 4240, note 5; see also Global Information Technologies, Inc., 5 FCC Rcd. 3385, 3387 (Rev. Bd. 1990). Thus, even assuming that Conant conditioned the loan in his conversation with Rey in late 1990, when RBC filed its fifth extension application in January 1991, RBC's loss of its exclusive tower space was only a possibility of something that might or might not happen in the future. In order for RBC to have lost its "reasonable assurance" two things would have had to happen, namely, the loss of RBC's exclusive tower space and, as a consequence, Conant's refusal to advance funds, which never happened. What happened, in fact, was that RBC decided to rely on equity, rather than the Conant loan, which was always available. Thus, there is no basis for concluding that RBC misrepresented facts or lacked candor in affirming it was financially qualified. [18]

110. Moreover, the record reflects that Conant never placed a contingency on his loan agreement. Conant, who did not testify in the court proceeding, emphasized that he never told Rey that he would withdraw from the financing agreement if Press got on the tower. In fact, Conant reaffirmed his interest in funding the project after the injunction was denied. Rey also confirmed that Conant never placed such a condition on his loan. As Rey explained, that was an accurate reflection of his (Rey) state of mind at the time he testified in the court proceeding. Rey was speculating as to what could happen to his financing plan if Conant, who was relying on Rey's broadcast judgment, was told by Rey that the project was not "viable" and was "worthless." (Tr. 795-796, 920-922). [19] It is interesting that in this case Rey, rather than the lender, Conant, was the reluctant suitor. Conant was far less pessimistic than Rey about the

[18] The staff's contention that RBC's failure to disclose this alleged condition constituted an intentional misrepresentation warranting disqualification is not supported by the record or Commission precedent and is rejected.

[19] It should be noted that Rey was seeking a preliminary injunction, an extraordinary relief, which required a showing of irreparable harm.

prospect of Press in the market. In this context, Conant felt it was appropriate to wait and see what would develop.

111. Further, no infusion of funds from Conant was needed at the time RBC sought a temporary injunction against Gannett. Conant's loan was needed for expensive items such as transmitter and antenna equipment. However, the purchase of such items had to await the completion of the construction of the transmitter building, which Gannett had not even begun and which was not finished until November 1991. As the record reflects, RBC's own funds were used in the construction of the transmitter building.

112. Finally, the district court's determinations in Rey v. Gannett, 766 F. Supp. 1142 (S.D. Fla. 1991) has no bearing on the factual inquiry here and the staff's request for official notice is denied. In order for RBC to succeed in obtaining a preliminary injunction, RBC had to meet certain prerequisites including carrying the burden on irreparable harm. That burden required RBC to show "potential harm which cannot be redressed by a legal or equitable remedy following a trial." Id. at 1147. Thus, the issues involved in the two proceedings and the burdens of proof are entirely different. Moreover, the criteria employed by the court in ruling that "there is no convincing proof that Rainbow actually has financial backing", Id. at 1148, is far more stringent than the Commission employs in passing on an applicant's financial qualifications. In this regard, the court ruled that RBC's claim of damages "appear speculative and remote" because "Rainbow has not arranged financing; a note for financing has not been completed." Id. at 1148. It thus appears that under the court's criteria, it was necessary for RBC and Conant to have entered into a legally binding agreement. However, the Commission has no such requirement. The Commission only requires a "reasonable assurance" that the loan will be available. Multi State, supra. Further, it is not even necessary that the agreement be in writing; an oral agreement is sufficient. As discussed, supra, RBC did not lose its "reasonable assurance" of the availability of the Conant loan and there is no evidence that RBC misrepresented facts or lacked candor in representations to the Commission. The issue is, therefore, resolved in RBC's favor.

Issue 3: Tower Litigation Misrepresentation Issue

113. The issue seeks to determine whether RBC made misrepresentations of fact or lacked candor "regarding the nature of the tower litigation in terms of the failure to construct in connection with its fifth and sixth extension applications." There are two basic questions germane to this issue: (1) was RBC truthful when it stated that "[a]ctual construction has been delayed by a dispute with the tower owner," and (2) did RBC intend to deceive the Commission by making the statement. The evidence clearly demonstrates both the truth of RBC's representation and the complete absence of intent to deceive.

114. As discussed more fully in the findings (findings 62-63), RBC's lease with Gannett specifically provides that while RBC could designate a contractor, only Gannett had the authority to construct the transmitter building, the first step in building RBC's station. The correspondence between Rey and Gannett officials show that despite RBC's repeated efforts to expedite construction, Gannett had not undertaken any construction of the transmitter building as of the date of the Judge's Order preserving the status quo. [20] In this connection, Rey's August 24, 1990 letter to Edwards (RBC Ex. 7, p. 8), reveals that RBC was hopeful that it could be operational by mid-1991 but was stymied by Gannett's failure to construct the transmitter building, the first step before equipment can be installed. Thus, had Gannett acted with reasonable diligence as it was required by the lease terms, the filing by RBC of a sixth extension application as well as this hearing may not have been necessary. As discussed in finding 79, Gannett's failure to undertake construction prior to the status quo order and the fact that it commenced construction of the transmitter building only after it signed a lease with Press for space on the tower raises suspicions about the conduct of Gannett and the possible complicity of Press. [21] However, while Ganett's failure to construct earlier is suspicious, it appears that while the status quo order was in effect, Gannett was barred from constructing the transmitter building since the same building and adjoining rooms were to be occupied by RBC and Press. In any event RBC did not have the authority to construct on its own. Therefore, it is concluded that RBC did not misrepresent facts and was not lacking in candor in the fifth and sixth extension applications in asserting that construction was "delayed by a dispute with the tower owner which is the subject of legal action...." The staff and Press' efforts to cast RBC's plain factual statement as somehow deceitful has no evidentiary support.

115. Moreover, assuming arguendo, as urged by STS and Press, that the status quo order only applied to Press and did not affect RBC, the blame for the failure to build the transmitter building still rests solely with Gannett. RBC is blameless since only Gannett had the contractual authority to construct the transmitter building. If, in fact, there was no bar to Gannett going ahead with such construction, its failure to do so reinforces the suspicion of an understanding not to construct the transmitter building until Press had secured antenna space on the Gannett tower.

[20] In concluding that there was no impediment to RBC's construction (see the staff's Proposed Conclusions, pp. 64-65), the staff completely ignores the lease terms and the extensive correspondence between Rey and Gannett officials detailing RBC's efforts to get Gannett to move forward with construction. In this connection, the staff's proposed findings and conclusions do not mention the fact that the transmitter building had not been constructed by Gannett, leaving the erroneous impression that the only remaining construction was the placement of RBC's antenna on the tower aperture.

[21] While the actions of Gannett and Press are outside the purview of this hearing, the Commission may wish to further consider this matter.

116. The sixth extension request outlining RBC's efforts to construct following the denial of the preliminary injunction are equally straightforward. As the correspondence between RBC and Gannett officials discloses, RBC intensified its efforts to get Gannett to construct the transmitter building. In marked contrast to its past dilatory tactics, and with Press now a lessee, Gannett was eager to move ahead with construction, completing the building in November 1991. RBC's representation that it would commence operation prior to December 31, 1992 was also truthful. RBC's statement was necessarily premised on the staff's timely granting the sixth extension application. RBC had no reason to anticipate that staff action would take two years. The record makes clear that RBC would have met that date if its extension request had been approved in a timely fashion. The sine quo non of willful misrepresentations or lack of candor is fraudulent or deceitful intent. Lompoc Minority Broadcasters Partnership, 10 FCC Rcd. 9396 (Rev. Bd. 1995). This record is marked by the truthfulness of RBC's representations and the complete absence of any intentional deception. Accordingly, the tower misrepresentation issue is resolved in RBC's favor.

Issue 4: Section 73.3534/73.3598 Issue

117. Issue 4 seeks to determine whether RBC has demonstrated under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified. The record evidence and controlling Commission precedent compel the conclusion that resolution of the issue in favor of RBC is justified.

118. The Commission's authority over construction permits derives from Section 319 of the Communications Act of 1934, as amended. Of particular note is paragraph (b) which states:

> Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

However, despite the statutory language as to forfeiture, the Commission must act affirmatively to forfeit a CP. Further, "even where the causes for delay of construction are within the control of the grantee, the Commission is given the power to exercise its discretion and allow further time for construction." Mass Communications Inc. v. FCC, 266 F.2d 681, 683 (D.C. Cir. 1959), certiorari denied, 361 U.S. 828. See also MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968).

119. The Commission in 1985 lengthened the construction period from 18 to 24 months for television station "in recognition of the substantial changes in the complexity and amount of the equipment needed and the growing multiplicity of business decisions involved in establishing a station." Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC 2d 1054, 1055 (1985). [22] At the same time, the Commission revised Section 73.3534 of the Commission's rules. Specifically, a permittee seeking an extension of time to construct must show either that it has completed construction and that testing is underway, that it has made substantial progress toward construction, or that circumstances beyond its control prevented its construction efforts. Id. at 1055-1056.

120. Section 73.3598(a) provides:

> TV Broadcast Stations. Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

Although Section 73.3598(a) provides that the applicant must specify a 24 month period, the Commission, acting within its discretionary authority, as recognized in Mass Communications and MG-TV Broadcasting, has allowed further time to construct in certain circumstances including where an applicant, such as RBC, is "faced with the uncertainties resulting from the appellate challenges to its construction permit." Rainbow Broadcasting Company, 11 FCC Rcd. 1167, 1168 (1995). Thus, in KWQJ (FM), 10 FCC Rcd. 8774 (1995), the Commission held that time spent in appellate litigation constitutes "reasons beyond the control of the permittee" for purposes of Rule 73.3534(b) and may not be counted against any permittee. In concluding that the extension request was justified, the Commission reasoned that the "pending judicial appeal renders any construction by AA at its own peril and excuses its failure to proceed." Id. at 8775. The Commission's determination that applicants should not be required to construct while the grant is under a cloud finds support in Channel 16 of Rhode Island, Inc. v. FCC., 440 F.2d 266, 275-276 (D.C. Cir. 1970) where the court held that "it is unfair and unreasonable to require construction while relevant FCC policy remains in limbo."

121. Turning to the facts in this case, although RBC's construction permit was issued on April 22, 1986, the grant remained under a cloud until the Supreme Court denied rehearing on August 30, 1990. Unlike other cases where an appellate challenge is limited to a comparative evaluation of accepted criteria, RBC was faced with the uncertainty of whether the Commission's minority ownership policies would withstand Constitutional scrutiny. Under these circumstances, RBC's unwillingness to expend funds in constructing while the appellate litigation

[22] Under the Federal Radio Commission, the time period within which to construct broadcast stations was four months. In 1934, the FCC provided an eight month construction period. In 1970, the construction period was again lengthened to 18 months. Id. at 1055.

was proceeding is readily understandable. Like KWQJ (FM), the period when RBC was under appellate challenge constitutes "reasons beyond the control of the permittee" and may not be counted against RBC. Assuming, arguendo, a waiver of Section 73.3598 is required, the uncertainty engendered by the appellate challenge to its construction permit justifies a waiver of the rule. See Channel 16, supra.

122. The Commission has also seen fit in the exercise of its discretionary authority to grant an extension of time to construct where the uncertainty is due to Commission inaction. "We believed, and continue to believe that it is unreasonable to require applicants to make further expenditures and continue construction efforts while their extension requests are pending." Rainbow, supra, at 1168. Consistent with this policy declaration, in Community Service Broadcasting, Inc., 8 FCC Rcd 5044 (1993), the Commission affirmed the staff's approval of an application for an extension of a construction permit and for consent to assign a construction permit. The Commission held that the decision to defer consummation of the transaction while matters are litigated before the Commission and the courts "is reasonable given that parties who consummate a sale transaction before its approval becomes final assume the risk that the sale may later be set aside by the Commission or the courts. See, e.g., Improvement Leasing Co., 73 FCC 2d 676, 684 (1979), aff'd sub nom. Washington Association for Television and Children v. FCC, 655 F.2d 1264 (D.C. Cir. 1981)." In the same vein, the Commission held in TV-8, Inc., 2 FCC Rcd. 1218, 1220 (1987) that an applicant should have a full 24 months in which to build and it would be unfair to expect the applicant to proceed with construction in the period after the denial of its extension application but before Commission action on the petition. See also Meridian Communications, 2 FCC Rcd. 5904 (Rev. Bd. 1987); Open Media Corp., 8 FCC Rcd. 4070 (1993).

123. Only five months elapsed from the time RBC's construction permit became final and the filing of its fifth extension application in January, 1991. Only ten months had passed at the time RBC filed its sixth extension application in June, 1991. The sixth extension application remained pending for two years, until June 18, 1993. In all, 22 of the 32 months that passed since the conclusion of litigation concerning RBC's license occurred after the expiration of RBC's construction permit.

124. The Commission made clear in the HDO, consistent with Commission precedent, that any construction RBC did or did not undertake outside a period when it held a valid construction permit is not germane to its decision whether to grant an extension of time. Rainbow, supra, at 1168. "[W]e neither accord applicants credit, nor sanction them, for the adequacy or inadequacy of any construction efforts that occur during this [lapsed permit] period." Id. at 1168-1169. The only time periods which may be considered in determining how much time a permittee has used and whether it is entitled to extensions are those periods, subsequent to judicial review, during which it has an unexpired construction permit. Id. at 1167.

125. The Commission's policy is grounded on two principles: First, the Commission wishes to "discourage applicants from attempting to rely" on efforts made after lapse of a construction permit "as a means to persuade the Commission to grant requests." Second, as discussed, supra, the belief that it is unreasonable to require applicants to make further expenditures and continue construction efforts while their extension requests are pending, citing the holding of Channel 16 and TV-8, Inc. Id. at 1168 and note 8.

126. In sum, under preexisting Commission policy, only 10 months of the 32 month post-judicial review fell in the category of time during which a permittee's failure to construct can be attributed to circumstances beyond its control. Since RBC received for less than the full 24 months to which it was entitled, Commission precedent and equitable considerations compel the conclusion that a grant of its sixth extension request is merited under the hardship provision of Section 73.3534(b) without regard to the extent of RBC's progress during the short period it held a valid construction permit.

127. Further, the record establishes that RBC had taken all possible steps to proceed with construction during the brief period it held a valid construction permit. It obligated itself to a 15 year site lease, made the payments under the lease and engaged in such pre-construction activities as planning of the transmitter building and selection of equipment. It could go no further in constructing until Gannett constructed the transmitter building. As reflected in the correspondence between Rey and Gannett officials, despite Rey's repeated efforts to expedite construction, the building was constructed only after Gannett signed a lease with Press authorizing use of the same antenna site as RBC. As discussed, supra, the record raises a serious question whether Press, RBC's competitor, played a role in Gannett's decision to delay construction of the transmitter building until Press was included as a tenant. Under the circumstances, Press' conclusion, shared by the staff, that "RBC's failure to construct was solely attributable to RBC's own voluntary decision not to proceed with construction" (Press Findings, Paragraph 177) rings particularly hollow. In Deltaville Communications, 11 FCC Rcd. 10793 (1996), the Commission made clear that the critical legal inquiry under Section 73.3534(b)(3) is whether the permittee has taken all possible steps to proceed with construction. The record makes plain that RBC fulfilled that requirement, providing a further compelling basis for concluding that a grant of an extension under Section 73.3534(b) is justified.

128. The ultimate issue calls for a determination whether RBC is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity. It is concluded, based on the evidence adduced under the evidentiary issues and Commission precedent, that RBC is qualified to be a Commission licensee and that grant of the pending applications serves the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the "Motion For Leave To File Table Of Contents And Summary" filed October 25, 1996 by The Separate Trial Staff, which is unopposed, IS GRANTED

IT IS FURTHER ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, [23] the application of Rainbow Broadcasting Company for an extension of time to construct and for an assignment of its construction permit for Station WRBW(TV) in Orlando, Florida IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

[23] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).